IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1127 OF 1994

M/s.Faizabadi Restaurant ...Petitioner
vs.
Sr.Inspector of Police & Anr. ...Respondents

Mr.S.P.Kanuga i/b Ms Poonam Bhosale for the Petitioner
Ms Rajeshree Gadhvi,A.P.P. for State

CORAM: A.S.OKA,J.
DATE : AUGUST 4,2005

P.C.:

1. Heard Counsel appearing for the parties. The case of the Petitioner is that he is holding a licence to keep a place of public entertainment under section 33(1) clauses (w) and (y) of the Bombay Police Act, 1951. According to the Petitioner, he is holding a licence under Bombay Shops and Establishment Act, 1948 and a licence issued by the Health Department of the Mumbai Municipal Corporation for running a restaurant of Grade-I. The case of the Petitioner made out in paragraph No.2 of the Petition is that the members of the public are entering the restaurant of the Petitioner for eating food and taking drinks. The case of the Petitioner is that classical/cultural dance is being performed in his restaurant on recorded music. A case is also made out that recorded music is being played in the restaurant. The case of the Petitioner is that any ancillary activities of playing music, band or classical dance on recorded music does not require a licence. The Petition is filed on the basis of oral threat given on 19th September 1994 by the Officer of Byculla Police

Station calling upon the Petitioner to stop the running of the restaurant with the music in his restaurant. The Petition was allowed to be amended. By inserting paragraph 6-A it is contended that the Respondents are not entitled to prevent the Petitioner from having classical or other types of dance under Rule 244 of Tamasha Rules, 1960 in the restaurant.

2. The learned Counsel for the Petitioner placed reliance on the decision of this Court reported in 1993 M.L.J. Page No. 1750 (Hotel Deepa Vs. State of Maharashtra). He has pressed into service paragraph No.8 of the said decision. He has placed reliance on decision of the Apex Court in case of Mohan H. Pai Vs. Commissioner of Police, Bangalore & Ors. delivered in Civil Appeal Nos. 1857-1858 of 2000 dated November 28, 2002. He submitted that the premises of the Petitioner is being predominantly used as a restaurant and activities of playing music are only ancillary activities and merely because the said activities are continued, it cannot be said that the premises of the Petitioner is a place of public amusement within the meaning of Section 2 (9) of the Bombay Police Act, 1951 (hereinafter referred to as the said Act of 1951). He submitted that notwithstanding the said ancillary activities, the place continued to be a place of public entertainment within the meaning of Section 2(10) of the said Act of 1951 and he is holding a valid licence in that behalf.

3. The learned A.P.P. submitted that when the licence

granted to the Petitioner is of a place of public entertainment, there cannot be any music or dance in the place. The learned A.P.P. submitted that no case is made out for interference in this Petition.

4. A reference will have to be made to the decision of the learned Single Judge of this Court in case of Hotel Deepa (supra). Paragraph No.8 of the said decision reads thus :

"8. Though the word "performance" has not been defined in the Act or the Rules, according to dictionaries, it means "musicial, dramatic or other entertainment". Playing of music in any and every case will not amount to musical performance. "Musical performance" conveys the idea of performance by musician which is attended by the public for deriving the pleasure of the performance. In other words, "playing of music or singing of songs etc." will fall within the ambit of "performance", only when it is held for public amusement. It will be so, if that musical programme is the principal attraction which has brought the public to that place, not otherwise. It is well known that ordinarily people go to restaurants for eating food etc. and not for amusement by musical performances. Music played in such restaurants cannot, therefore, be "musical performance" and such restaurant is not required to obtain "Performance Licence" under Rule 116 of the 1960 Rules. But there may be cases, where a restaurant may also hold "musical performances". Take

for instance a restaurant organising musical programmes of some artists in the restaurant which is attended by public. Such programme may be termed as "musical performance" and "Performance Licence" may be required because, in that case, the attendance of the public to that place is for amusement - eating is incidental. If the activity of playing of music of a restaurant falls in such category to attract Rule 116, the authority concerned will have to say so and give an opportunity of hearing to the person concerned, if he so likes, to place its facts before the authorities to satisfy them that his activity does not amount to "performance". Evidently, in the instant case, there is no such allegation against the petitioner. "

5. The learned Single Judge has referred to the Rule 21(1) of the Rules for keeping a place of public entertainment in Greater Bombay. The said rule provides that no person keeping a place of public entertainment shall play or allow any music to be played in such a place except in accordance with provisions incorporated in the said Rule. The said rule permitted music to be played in a place of public entertainment only subject to restriction and exception set out in the said Rule. It is brought to my notice that on 15th October 1994, the said rule has been substituted by the following Rule :

"21. No person keeping places of public entertainment shall

hold musical dancing, Dramatic Mimetics, Theatrical or other performances for public amusement including Melas and Tamashas or any public exhibition or diversion or game unless he has obtained a Performance License from the Licensing Authority to hold such performances under Rule 116 of the Rules for Licensing and Controlling Places amusement (Other than Cinemas) and Performances for public amusement including Melas and Tamashas, 1960".

6. It is obvious that the rule which was in force till 15th October 1994 permitted the person keeping a place of public entertainment to play music in the place in certain circumstances. Under the substituted rule, the said provision is not found. Rule 21 as it exists today does not specifically permit the person keeping place of public entertainment to allow any music to be played at such place.

7. Reference will have to be made to the decision of the Apex Court in case of Mohan (supra). The Apex Court had an occasion to consider the Karnataka Police Act with reference to the definition of "place of public amusement' and "place of entertainment". Though the definitions in the Bombay Police Act, 1951 of the said places are not exactly identical with the definitions in Karnataka Police Act, there is no material difference in the said definitions. The Apex Court having considered the definitions has held thus :

. "Having regard to the different terminologies, defining a place of public amusement: as well as "a place of public entertainment", **in order to find out whether a place can come within the definition of both, one will have to examine the dominant purpose for which the premises is put to use.**

. A place to which the public are admitted and where any kind of food and drinks are supplied for consumption in the premises, would undoubtedly come within the expression "place of public entertainment" and in the case in hand the restaurant and the bar in question would come within the aforesaid definition of "place of public amusement" has been defined to mean any place where music, singing, dancing or gaming is provided and to that place public are admitted emphasises that the place in question before attracting the definition must essentially be used for either providing music, singing, dancing or gaming and to such premises, the public would be admitted. The later **part of the definition clause in Section 2(14) by including certain other clauses of premises makes the definition, no doubt, more extensive, but that by no stretch of imagination, would bring within its sweep where a premises is essentially a place of public entertainment and in that premises some music is provided for. In the case in hand, the restaurant and bar is a place to which public are admitted and food and drinks are supplied for consumption in the premises. Merely because a live band is also provided it would assume the character of "public**

amusement' within the ambit of Section 2(15). The Licensing order also unequivocally is an order for controlling places of public amusement. Though Section 31 of the Police Act confers power on the authority to issue Licensing and Controlling Orders both in respect of "place of public amusement' and "place of public entertainment", but in the case in hand the order has been made only in respect of "public amusement". That being the position, in interpreting any provision of the Licensing Order, the legislative intent engrafted in making distinction between the two terminologies also shall have to be borne in mind." (emphasis supplied)

8. The Apex Court held that a place to which the public are admitted and where any kind of food or drink are supplied for consumption would undoubtedly come within the expression of public entertainment. The Apex Court in the case before it, held that the restaurant and the bar in question would come within the definition of place of public entertainment. The Apex Court held that merely because live band is played in a place predominantly used as a place of public entertainment, it would not assume the character of public amusement within the ambit of Section 2(15) of Karnataka Act. The test which is adopted by the Apex Court is the test of dominant purpose of use.

9. Coming back to the facts of the present case, it is obvious that if in any place of public entertainment, a dance

is performed, definition of place of public amusement Section 2(9) will be attracted requiring a separate licence. Therefore, only on the basis of licence granted for keeping a place of public entertainment the Petitioner will not be entitled to have performance of cultural or traditional dance. In so far as playing music is concerned, the test adopted by the Apex Court of the dominant purpose for which premises are being used will have to be followed by the authorities.

10. Whether the Petitioner is dominantly using the place as a place of public entertainment or a place of public amusement are factual questions to be decided and in a Writ Petition under Article 227 of the Constitution of India, the said questions cannot be gone into. Hence, this Petition invoking Article 227 cannot be entertained. Subject to observations made above, the same is rejected.

JUDGE